# 92-1481

No. 93-

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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KONRAD RADASZEWSKI, by CECILIA RADASZEWSKI,
His Guardian,
*Petitioner,*

v.

TELECOM CORPORATION,
*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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March 12, 1993

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## QUESTIONS PRESENTED

1. Did the Court of Appeals subject petitioner, who was faced with a Rule 12(b)(2) jurisdictional challenge, to an unfair and inappropriate burden of proof when it, sua sponte, and without prior notice to the parties, transformed the motion into one for summary judgment under Rule 56 and made factual determinations on the merits?

2. Did the Court of Appeals contravene Missouri law and public policy by holding that the purchase of insurance, regardless of the source or amount, completely relieves a parent corporation of its duty to adequately capitalize its insolvent subsidiary?

## LIST OF PARTIES

In addition to petitioner and respondent, the following were parties (defendants) to the original action:

Contrux, Inc.

Dan Leslie Satterfield (Employee of Contrux and driver of the truck that injured petitioner.)

Flexi-Van, Inc. (Lessor of truck to Contrux, guaranteed by Telecom.)

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## PETITION FOR WRIT OF CERTIORARI

Konrad Radaszewski, by his guardian Cecilia Radaszewski, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 981 F.2d 305 (8th Cir. 1992) and is reprinted at Appendix A. The Eighth Circuit's order denying rehearing, along with other orders of the district court and the court of appeals, are reprinted at Appendices B through D.

## JURISDICTION

The decision of the Eighth Circuit Court of Appeals was filed on November 12, 1992. A timely motion for rehearing was denied on December 14, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

This tort case involves the application of Missouri common law, as set out below, by federal courts; the Federal Rules of Civil Procedure (particularly Rules 12(b)(2) and 56); and the Seventh and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

### A. The Accident.

While on summer vacation on August 21, 1984, Konrad Radaszewski, a native of Almond, Wisconsin, was stopped on the shoulder of Interstate Highway 70 in Independence, Missouri, tending to his disabled motorcycle. At that time, an 18-wheel tractor-trailer unit driven by Dan Leslie Satterfield, an employee of Contrux, Inc., while speeding on the rain-soaked highway jack-knifed out of

control and collided with Radaszewski. As a result of that impact, Konrad Radaszewski now spends 24 hours a day in a hospital bed or wheelchair. He is a brain damaged spastic quadriplegic. He can communicate only with the aid of a computer board and needs 24 hour attendant care to stay alive.

At all times, Contrux, Inc. was a wholly owned undercapitalized subsidiary of Telecom Corporation. Contrux was formed for the sole purpose of creating a non-union over-the-road carrier to replace Spector Red Ball, a unionized subsidiary of Telecom. At its inception and throughout its short lifetime, Contrux was completely controlled by Telecom and was simply a grossly undercapitalized shell corporation. As a result of this factual milieu, Radaszewski filed an action against Telecom Corporation directly, seeking redress for the severe damages he incurred at the hands of Contrux.

**B. Proceedings in the Lower Courts.**

The ruling at issue represents the second appeal to the Eighth Circuit. Initially, Telecom filed a motion to dismiss petitioner's complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(2) and for failure to state a claim under 12(b)(6). The district court held that petitioner could not assert jurisdiction over Telecom without piercing the corporate veil. Presumably, the other requirements of due process and the state long arm statute have been met. The parties and courts below agree that the appropriate standard for piercing the corporate veil in Missouri is set forth in the case of *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986):

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

*Id.* at 284.

The district court granted Telecom's motion to dismiss for lack of personal jurisdiction under 12(b)(2), on the grounds that the first element of the *Collet* test, control, had not been met. App. D. This ruling was certified for interlocutory appeal under 28 U.S.C. § 1292(b), and reversed by the Eighth Circuit Court of Appeals. App. C. The cause was then remanded for additional discovery on the issues of control and undercapitalization, in order to support the first and second elements, respectively.

After allowing additional discovery, the district court reconsidered the motion to dismiss and again granted it under Fed. R. Civ. P. 12(b)(2), holding that plaintiff had made a sufficient showing as to the first and second elements of the *Collet* test, but that the third element, proximate cause, had not been met because plaintiff's loss had not yet been reduced to judgment and, therefore, did not represent a liquidated claim. App. B. The district court based its holding on discovery materials and the uncontradicted affidavit of a qualified CPA and financial analyst who stated that Contrux was, in fact, grossly undercapitalized from its inception and throughout its existence. The dismissal was without prejudice, presumably on the theory that, if Radaszewski should prevail at trial against the subsidiary, and if the judgment should ultimately turn out to be uncollectible, he could then refile against Telecom. Again, the dismissal was certified for interlocutory appeal under 28 U.S.C. § 1292(b) and the court of apepals affirmed, albeit on a completely different

basis [1] than the district court, and adding that it was now *with* prejudice. App. A.

The court of appeals, after a lengthy factual discussion, held that plaintiff had made a sufficient showing as to control, but failed to satisfy the *second* element of the *Collet* test. Specifically, the court of appeals adopted the parent corporation's line of defense that Contrux, although admittedly undercapitalized, had purchased some liability insurance and, therefore, this precluded any finding of improper purpose or intent on the part of Telecom as a matter of law. Requiring this type of subjective finding directly conflicts with controlling state law (and with virtually every other jurisdiction). Indeed, prior to this ruling, the district court had agreed that undercapitalization alone satisfies the second prong of the Missouri test. Throughout these fact-laden proceedings, all rulings have been based on Rule 12(b)(2) of the Federal Rules of Civil Procedure, although the court of appeals ostensibly chose to apply the Rule 56 standards for summary judgment in coming to its final conclusions. The procedural transformation of this matter is among the issues presented in this petition.

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[1] The Eighth Circuit did not address the district court's opinion as to the third element. App. A, *infra*, at 4a. In his well reasoned dissent, Senior Circuit Judge Heaney notes that the district court's decision as to the third element is inconsistent with Missouri law. "It is clear when the action of the dominant corporation renders the subservient corporation insolvent, then the requisite injury and causal connection is established." Quoting *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273, 287 (Mo. App. 1986). Judge Heaney also adds that "it makes little sense to have two trials when all issues can be resolved in one." App. A at 17a.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' DECISION ADDS TO THE GROWING CONFUSION IN THE FEDERAL COURTS REGARDING A TORT PLAINTIFF'S BURDEN OF PROOF AT THE PRETRIAL STAGE.

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a divided Court held that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that govern the case. *Id.* at 255. According to the majority, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. The dissenters argued that this new approach to summary judgment, which requires the court to assess the "quantum" of evidence presented by the non-moving party, would lead to impermissible fact-finding by the judge and put counsel for the non-moving party in a quandary as to how much evidence he will need to present at the pretrial stage. *Id.* at 267, 269-273.

The case at bar illustrates this problem and takes it one step further. Here, the petitioner was faced with a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, which historically would place a minimal evidentiary burden on him. See *infra*. Instead, petitioner was blind-sided by the court of appeals, who transformed this jurisdictional challenge into a factual analysis of the merits, without prior notice to the parties. The court of appeals rejected the prima facie standard required by Rule 12(b)(2) as "confusing" and proceeded to utilize a preponderance of the evidence standard under Rule 56.[2] Surely, the *Anderson* majority did not intend this result. While the use of the "prism" may be appropriate when the parties knowingly enter the evidentiary battle on a written motion for summary judgment, it cannot be justified when a court, sua sponte, transforms a jurisdictional challenge under 12(b)(2) into a Rule 56 motion without

[2] App. A at 11a-12a.

advance notice to the non-moving party.[3] Application of *Anderson* to "transformed" cases would represent a serious departure from well-settled law regarding the standards for motions to dismiss, and could lead to a greater burden for all district courts if every plaintiff faced with a jurisdictional challenge were forced to present mountains of evidence and affidavits out of fear of a procedural transformation[4] which would result in the judge's weighing of the parties' substantive evidence. Although petitioner maintains that he did present evidence showing a genuine issue of material fact in this case, the federal courts clearly need guidance as to the proper burden of proof, especially in light of *Anderson* and the conflict between the circuits on this point.[5]

### A. The Lower Courts Applied an Incorrect Standard of Review to a Motion To Dismiss for Lack of Personal Jurisdiction.

Under settled federal procedure, in order to assert in personam jurisdiction over a nonresident defendant, the plaintiff simply needs to make a prima facie showing that the required elements of jurisdiction are present.[6] In this

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[3] In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), the Court noted that district court judges have the power to enter summary judgment sua sponte "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326.

[4] The issues at bar have always been treated under 12(b)(2). While Fed. R. Civ. P. 12(b) provides for the "transformation" of a 12(b)(6) motion into one for summary judgment, there is no similar provision for 12(b)(2) motions, which would support the federal common law principle that less is required of a party seeking to establish jurisdiction as opposed to substantive issues.

[5] E.g., the Ninth Circuit in *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977), held that the plaintiff need only make a prima facie showing of the elements of piercing the corporate veil and that forcing any greater burden on plaintiffs, such as a preponderance of the evidence, would be unfair. *Accord Central Communications, Inc.* v. *City of Jefferson City, Mo.*, 589 F. Supp. 85 (W.D. Mo. 1984).

[6] See *Nelson* v. *R. Greenspan & Co., Inc.*, 613 F. Supp. 342, 345 (E.D. Mo. 1985); *Sun World Lines, Ltd.* v. *March Shipping Corp.*,

regard, the plaintiff's burden is said to be minimal or slight.[7] In this case, petitioner presented prima facie evidence of the elements of piercing the corporate veil under Missouri law.[8]

Under the Missouri Long Arm Statute, personal jurisdiction can be asserted over a nonresident defendant as a result of the commission of a tortious act within this state. Mo. Rev. Stat. § 506.500(3) (Supp. 1984). In addition, jurisdiction may be asserted if due process requirements are met, i.e., if the defendants have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). In determining jurisdiction, the Missouri Supreme Court has held that, at this stage of the proceedings, the plaintiff's bur-

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585 F. Supp. 580, 582 (E.D. Mo. 1984). *Breiner Equipment Co.* v. *Dynaquip, Inc.*, 539 F. Supp. 204, 205 (E.D. Mo. 1982); *Barclays Leasing, Inc.* v. *National Business Systems, Inc.*, 750 F. Supp. 184, 186 (W.D. N.C. 1990); *Behagen* v. *Amateur Basketball Assoc. of United States of America*, 744 F.2d 731 (10th Cir. 1984); *Daval Steel Products* v. *M.V. Juraj Dalmatinac*, 718 F. Supp. 159 (S.D.N.Y. 1989); *Newport Components, Inc.* v. *NEC Home Electronics (USA), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987); *Stephenson* v. *Barringer*, 758 F. Supp. 657 (D. Kan. 1991); *Flynt Distributing Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984); *Aaron Ferer & Sons Co.* v. *Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977); *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Strong* v. *RG Industries*, 691 F. Supp. 1017, 1018 (S.D. Miss. 1988); 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1068 at 250 (1990).

[7] E.g., *Central Investment Corp.* v. *Mutual Leasing Assoc., Inc.*, 523 F. Supp. 74, 77 (S.D. Ohio 1981); *Welsh* v. *Gibbs*, 631 F.2d 436 (6th Cir. 1980).

[8] It should be noted that other courts have simply applied a minimum contacts analysis to affiliated non-resident corporations. The relationship itself is a minimum contact which may support long arm jurisdiction. Further, if the relationship is one of control (as in the case of Telecom), jurisdiction is proper. *Hoffman* v. *United Telecommunications, Inc.*, 575 F. Supp. 1463, 1472-76 (D. Kan. 1983).

den is limited to making a prima facie showing that acts contemplated by the statutes took place. "Certainly a trial on the merits is not required, which, among others, might include questions of negligence, contributory negligence, contributory fault, causation and the extent of damages . . ." *State ex rel. Deere & Co.* v. *Pinnell*, 454 S.W.2d 889, 893 (Mo. banc 1970).

Where the trial court uses only pleadings, discovery materials and an affidavit to determine whether personal jurisdiction exists, all disputes about jurisdictional facts, including issues of corporate relationship, should be resolved in favor of the plaintiff even though he will have to establish those facts *later* by a preponderance of the evidence.[9] The truth of undisputed allegations of plaintiff's complaint will be assumed. *Boddie* v. *Connecticut*, 401 U.S. 371, 373 (1971).

It has also been held that less proof is needed on jurisdictional issues than substantive ones at the pre-trial stage. See, e.g., *Mortensen* v. *First Federal Savings & Loan Assoc.*, 549 F.2d 884, 892 (3rd Cir. 1977), which also holds that it is not fair for a district court to evaluate jurisdictional evidence that unfairly precludes a fair trial on the merits of a case. When jurisdictional and liability issues are intertwined, the Third Circuit has held that "we feel that it is incumbent upon the trial judge to demand *less* in the way of jurisdictional proof than would be appropriate at a trial stage." *Id.* (emphasis added). Instead of resolving doubts in favor of jurisdiction, the *Radaszewski* courts made it contingent on the merits.

When the determination of a jurisdictional issue depends upon a ruling on the merits, however, the lower court should proceed to a trial on the merits and the jurisdictional issue should therefore await such a determination. It is far preferable that the determination be made at trial where the plaintiff can present his case in

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[9] *Tax Lease Underwriters, Inc.* v. *Blackwall Green Ltd.*, 613 F. Supp. 1082 (E.D. Mo. 1985); *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Myers* v. *Johns Manville Sales Corp.*, 600 F. Supp. 977 (D. Nev. 1984).

a coherent orderly fashion without any risk of prejudice with respect to his case on the merits. See *Data Disc, Inc.* v. *Systems Technology Assoc., Inc., supra*, at 1285-86; *Tax Lease Underwriters, Inc.* v. *Blackwall Green Ltd.*, 613 F. Supp. 1082, 1088 (E.D. Mo. 1985).[10] All doubts on jurisdictional points must be resolved in favor of plenary trial rather than dismissal at the pre-trial stage.[11]

Again, the lower courts did not rule that there were insufficient minimum contacts to sustain jurisdiction. Rather, the district court held that it was necessary to pierce the corporate veil before asserting jurisdiction over the parent company. Assuming the district court was correct in combining the substantive issues with the jurisdictional ones, Radaszewski was entitled to have the jurisdictional issues submitted to the jury.[12]

In *Bialek* v. *Racal-Milgo, Inc.*, 545 F. Supp. 25 (S.D. N.Y. 1982), the court noted that certain unrebutted allegations with respect to a parent corporation's control of its wholly-owned subsidiary established a prima facie case

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[10] See also, *Myers* v. *Johns Manville Sales Corp.*, 600 F. Supp. 977, 981 (D. Nev. 1984); *Institutional Food Marketing Assoc., Ltd.* v. *Golden State Strawberries, Inc.*, 747 F.2d 448, 451 (8th Cir. 1984); *Block Industries* v. *DJH Industries, Inc.*, 495 F.2d 256, 259 (8th Cir. 1974).

[11] In *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966), a shareholder brought a derivative action against corporate officers who had allegedly defrauded the corporation. The Supreme Court held that "the basic purpose of the federal rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . If the rules of procedure work as they should in honest and fair judicial systems, they not only permit, but should as nearly as possible guarantee that bonafide complaints be carried to an adjudication on the merits." *Accord Miller* v. *Central Chinchilla Group, Inc.*, 494 F.2d 414, 417 (8th Cir. 1974).

[12] *Thornhill Publishing Co., Inc.* v. *General Telephone & Electronic Corp.*, 594 F.2d 730, 735 (9th Cir. 1979); *McBeath* v. *Inter-American Citizens for Decency Committee*, 374 F.2d 359, 361 (5th Cir. 1967); *Berardinelli* v. *Castle & Cooke, Inc.*, 587 F.2d 37, 38 (9th Cir. 1978).

so as to sustain jurisdiction. The case also noted that the defendant seeking a dismissal cannot prevail merely by rebutting such allegations in the context of a pre-trial motion such as Telecom has presented here. Unless the defendant's moving papers entirely refute plaintiff's allegations, the defendant can only gain such a dismissal at the close of proof at trial. *Id.* at 32. See also *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

Although the district court paid lip service to the concept of a plaintiff's prima facie obligation, it looked past the competent evidence presented by petitioner and proceeded to pick and choose between facts alleged by the parties, even though respondent did not present affidavits or other evidentiary proof. The court of appeals went even further and openly rejected black letter law regarding petitioner's prima facie burden. App. A at 11a-12a. By holding that the purchase of insurance completely negates the otherwise inadequate capitalization of Contrux, the court of appeals made specific factual determinations which were inappropriate for this stage of the proceedings. When the facts alleged in the plaintiff's complaint and supporting affidavits are controverted by defendant's affidavits, the conflict is resolved in the plaintiff's favor for purposes of establishing a prima facie case.[13] See also *Pocahontas First Corp.* v. *Venture Planning Group*, 572 F. Supp. 503, 505 (D. Nev. 1983). Therefore, even if Telecom had presented a conflicting affidavit from a qualified expert, the district court should have honored the veracity of plaintiff's initial affidavit. Here, defendants did not present any conflicting evidence and, therefore, dismissal was improper.

The often-cited case of *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977) illustrates the conflict between the Eighth Circuit (who re-

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[13] *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d (S.D.N.Y. 1982); *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 1280 (9th Cir. 1977); *Bialek* v. *Racal-Milgo, Inc.*, 545 F. Supp. 25 899 (2d Cir. 1981).

jected the prima facie standard as too confusing) and other circuits. *Data Disc* held that if the court determines it will receive only affidavits or affidavits plus discovery materials, these very limitations dictate that a plaintiff must make only a prima facie case showing jurisdictional facts in order to avoid defendant's motion to dismiss. *Id.* at 1285. Most importantly, the Ninth Circuit held that any greater burden, such as proof by a preponderance of the evidence, would permit a defendant to obtain a dismissal simply by controverting the facts established by plaintiff. *Id.* at n.2. Radaszewski has clearly established a prima facie case for jurisdiction purposes. Because the court was considering only one affidavit and some discovery materials, it is unfair to subject Radaszewski to any greater burden, especially when respondent presented *no* conflicting affidavits. At the very least, a full evidentiary hearing should be held where plaintiff can expand upon his proof surrounding the undercapitalization of Contrux.

Similarly, *Central Investment Corp.* v. *Mutual Leasing Assoc., Inc.*, 523 F. Supp. 74, (S.D. Ohio 1981), held that "while the burden of establishing jurisdiction is on the plaintiff, [citations omitted], where the district court determines to decide the issue solely on the basis of written materials, *that burden is relatively slight.* The plaintiff is only required to make a prima facie case of jurisdiction and the district court must consider the pleadings and affidavits in the light most favorable to plaintiff." *Id.* at 77. (emphasis added). Moreover, the burden placed on plaintiffs in establishing "alter ego" liability should be even lighter for tort victims than for those involved in contracts, because the latter benefits from arm's length dealing and voluntary choice.[14] Instead of having a "relatively slight" burden, Radaszewski faced a burden that was virtually insurmountable.

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[14] Courts have been more willing to disregard corporate structure in tort, as opposed to contract cases. This difference in treatment can be attributed in major part to the element of choice inherent in a contractual relationship. Obviously, a tort victim has had no

Motions to dismiss should not be granted simply because a judge chooses not to believe the plaintiff's factual allegations. *Neitzke* v. *Williams*, 490 U.S. 319, 109 S. Ct. 1827, 1832 (1989). According to this Court, a claim cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*[15]

It is not the function of a reviewing court to assess the merits of a particular claim when ruling on a motion to dismiss but, rather, to determine whether plaintiff may introduce evidence to support his claim. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). In *Data Disc. Inc.* v. *Systems Technology Assoc., Inc., supra*, piercing the corporate veil turned largely on conflicting views of the facts. The district court was presented with conflicting affidavits and chose to analyze those in granting the defendant's motion to dismiss for lack of personal jurisdic-

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opportunity to negotitae with the defendant or to investigate the financial soundness of the tortfeasor. See Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929); *Miles* v. *AT&T*, 703 F.2d 193 (5th Cir. 1983); *Texas Industries, Inc.* v. *Lucas*, 634 S.W.2d 748 (Tex. App. 1982); *Hanson Southwest Corp.* v. *Dal-Mac Construction Co.*, 554 S.W.2d 712 (Tex. App. 1977); *West* v. *Costen*, 558 F. Supp. 564 (W.D. Va. 1983). In *United States* v. *Golden Acres, Inc.*, 702 F. Supp. 1097 (D. Del. 1988) the government was not estopped from arguing undercapitalization of a corporation as a basis for piercing the corporate veil, even where the Department of Housing and Urban Development had repeated dealings with this corporation and knew it was undercapitalized. Interestingly, the district court in *Radaszewski* did allow Flexi-Van to pierce the corporate veil because it had the foresight to obtain Telecom's guarantee before leasing equipment to Contrux. App. B. Obviously, Konrad Radaszewski did not have this opportunity.

[15] *Accord Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969); *Southwest Investments I* v. *Midland Energy Co., Inc.*, 596 F. Supp. 219, 222 (E.D. Mo. 1984). See also *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979) (Complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action.)

tion. The Ninth Circuit flatly rejected this approach, stating that "we do not see how it is possible for the district judge to 'weigh' the affidavits in order to resolve dispute issues. Except in those rare cases where the facts alleged in an affidavit are inherently incredible and can be so characterized solely by a reading of the affidavit, the district court has no basis for a determination of credibility. This is not one of those rare cases . . ." 557 F.2d at 1284. Importantly, the Ninth Circuit Court of Appeals also noted that if only one side of the conflict were to be supported by affidavit, "the task would be easy because we may not assume the truth of allegations in a pleading which are contradicted by affidavit".[16] Thus, *Data Disc* correctly held that where there are two conflicting affidavits, the benefit of the doubt must go against the granting of a motion to dismiss. Arguably, the Ninth Circuit, when presented with the facts at bar (i.e., where there is only *one* uncontested affidavit), would have made this appeal unnecessary.

Importantly, the Ninth Circuit focused on the appropriate burden of proof which should be placed upon the plaintiff at this stage. Noting that a prima facie showing is sufficient, the court discussed the fundamental unfairness of forcing the plaintiff to come forward with further proof on a motion to dismiss. *Id.* at 1285. As mentioned above, it is difficult to reconcile the minimal burden which a plaintiff has to bear in avoiding a motion to dismiss with the increasingly difficult standards needed to withstand a motion for summary judgment under *Anderson*.[17] At the very least, before a motion to dismiss can be treated by the court as a motion for summary judgment, all parties should be given a reasonable opportunity to present pertinent evidence. *Central Communi-*

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[16] *Id.*, quoting *Taylor* v. *Portland Paramount Corp.*, 383 F.2d 624, 639 (9th Cir. 1967).

[17] 477 U.S. 242. See also *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

*cations, Inc.* v. *City of Jefferson City, Mo.*, 589 F. Supp. 85 (W.D. Mo. 1984).[18]

Due process requires that persons who are forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. U.S.C.A. Const. Amend. Fourteen; *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Under the Seventh amendment, claimants are entitled to a jury trial in all actions at common law where the value and controversy exceeds $20.00. See e.g., *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970). These constitutional guarantees are severely undercut when federal courts usurp the jury's function and prematurely grant dispositive motions.

In the case at bar, petitioner submitted competent evidence showing (1) control and dominance over the subsidiary; (2) undercapitalization of the subsidiary; and (3) the unjust result if the corporate veil is not pierced. These are all of the elements required by *Collet*. In addition to his well pleaded complaint, petitioner presented the affidavit of John Meara, a CPA whose qualifications have not been contested in any way by the respondent. In doing so, Radaszewski more than satisfied the "very minimal burden" required in order to avoid a motion to dismiss. It is obvious from the orders of the lower courts, however, that petitioner was subjected to a much different standard, even more stringent than a preponderance of the evidence.

The most disturbing aspect of the court of appeals' decision is its complete rejection of the standards applicable to a 12(b)(2) motion to dismiss. The Eighth Circuit expressly rejected the prima facie standard as "confusing" and incorrectly stated that "though the motion is captioned under Rule 12(b)(2) rather than under Rule 56, *the analytical process is the same as that used on a*

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[18] See also *Bennett* v. *Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982); *E.C. Alford* v. *National Post Office Mail Handlers*, 576 F. Supp. 278, 282 (E.D. Mo. 1983); *Kuhlmeier* v. *Hazelwood School District*, 578 F. Supp. 1286, 1291 (E.D. Mo. 1984).

*motion for summary judgment.*" App. A at page 12a (emphasis added). There are three serious problems with this approach. First, this greatly increases the burden of proof placed on the tort plaintiff at the pretrial stage.[19] Second, it creates a conflict with those circuits which continue to follow traditional procedures regarding motions to dismiss.[20] Finally, the sua sponte transformation of a 12(b)(2) motion into a full blown motion for summary judgment under Rule 56 jeopardizes the tort plaintiff's right to due process and to trial by jury because it does not provide an adequate opportunity for the non-moving party to meet this heightened evidentiary burden.[21]

### B. The Court of Appeals' Holding Cannot Be Reconciled With This Court's Guidelines Regarding Summary Judgment.

Even if it was appropriate for the court of appeals to sua sponte transform Telecom's motion to dismiss into one for summary judgment, the evidence proffered by petitioner was sufficient to defeat the motion because there are genuine issues of material fact. First, it should be noted that the Eighth Circuit opinion is predicated on its belief that the corporate subsidiary was not "improperly" undercapitalized [22] because the parent purchased liability insurance on its behalf. At the very least, the uncontested affidavit of petitioner's expert witness shows that this is a genuine issue of material fact. App. B at 21a. Further, the district court soundly rejected the "insurance defense" and agreed that plaintiff had shown undercapitalization on the part of the subsidiary, satisfy-

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[19] Compare *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) with *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977).

[20] *Id.*

[21] *Anderson, supra*, 477 U.S. at 267, Brennan, J. dissenting.

[22] Importantly, the court of appeals stated that the subsidiary *was* undercapitalized "in the accounting sense". App. A at 7a. In talking about corporate financial structure, one might wonder what other sense there could possibly be. See Solomon article, *infra*.

ing the second *Collet* element.[23] If the sole basis of the Eighth Circuit opinion is its factual disagreement with a competent affidavit and the district court itself, surely there is a genuine issue of material fact which precludes the entering of a summary judgment.

In *Anderson* v. *Liberty Lobby*, *supra*, this Court held:

> The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not.

477 U.S. at 254.

Under this "reasonable juror" standard, Radaszewski clearly should prevail. The district court judge and Senior Circuit Judge Heaney found ample evidence that petitioner satisfied the second element of *Collet*. The two remaining Eighth Circuit justices, relying on Telecom's unsupported factual assertions, found otherwise. If federal judges can differ on the facts, surely this satisfies the *Anderson* standards for avoiding summary judgment.

Further, this Court has indicated that it continues to revere and protect the role of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

*Id.* at 255, citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S. at 158-159 (1970).

The nature of corporate inter-relationships is in and of itself an issue of material fact. Certainly, undercapitalization is always held to be an important issue, if not *the*

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[23] The district court held that petitioner "made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance . . ." App. B at 23a.

most important issue in determining whether to disregard a corporate entity.[24] Factual disputes as to whether the corporation was adequately capitalized are sufficent to raise a fact issue as to whether the management and operation of the parent and subsidiary are assimilated enough to disregard the corporate fiction.[25]

Here the Eighth Circuit held, as a matter of law, that the purchase of insurance (albeit through another subsidiary and from a poorly-rated, soon to be insolvent excess carrier) eliminated the undercapitalization element from the *Collet* equation. This analysis flies in the face of the approach taken by legal scholars and courts throughout the country. For example, *Atlas Comstruction Co.* v. *Slater*, 746 P.2d 352 (Wyo. 1987) noted that the existence of insurance might be a factor contributing to the issue of adequate capitalization, but there is no suggestion that insurance could be a substitute for this serious corporate obligation:

> Whatever the court's requirements in terms of inadequacy of assets, courts must still consider many varying factors relevant to their deliberations. For example, where the inadequacy of capital and other assets is at issue, the testimony of expert financial analysts and statisticians as to comparable businesses may be relevant. Perhaps this analysis might include evidence of the adequacy of insurance coverage and

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[24] *Cummings* v. *HCA Health Services of Texas, Inc.*, 799 S.W.2d 403, 406 (Tex. App. 1990); Salomon, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temple Law Quarterly 321 (1974).

[25] *West* v. *Costen*, 558 F. Supp. 564, 585 (W.D. Va. 1983); *DeWitt Truck Brokers* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976); *Atlas Construction Co.* v. *Slater*, 746 P.2d 352 (Wyo. 1987); *In re: IOTA Industries, Inc.*, 35 B.R. 603, 605 (S.D. N.Y. 1983); *Flynt Distributing Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *Collet, supra*, 708 S.W.2d 273, 286 (Mo. App. 1986); *Consolidated Sun Ray, Inc.* v. *Oppenstein*, 335 F.2d 801, 808 (8th Cir. 1964).

involve testimony concerning the amounts of insurance carried by comparable businesses.[26]

Clearly, the *Atlas* court contemplated the analysis of insurance coverage as one factor to be determined in analyzing the issue of undercapitalization. Obviously, the insurance acquired by Telecom for Contrux was less than adequate. Otherwise, plaintiff would have an adequate remedy. In any case, it was improper for the court of appeals to come to its conclusion without hearing evidence on the "many varying factors relevant to their deliberations". *Id.*

Historically, summary judgment could not be granted unless the moving party could show that the facts and the law would preclude recovery by the plaintiff. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). It is impossible to reconcile this principle with the Eighth Circuit ruling in this case. The court of appeals' opinion cannot be upheld under this Court's standards would be if undercapitalization were the *only* factor to consider in deciding whether or not to pierce the corporate veil *and* if the purchase of *any* insurance (regardless of source or amount) would, as a matter of law, preclude any finding of undercapitalization. As shown below, such a finding would contradict virtually all Missouri and national case law on the subject.

The court of appeals held that because Telecom went through the motions of obtaining insurance, it was thereby relieved of its obligation to provide an adequate financial basis for its subsidiary. Instead of allowing this critical area to be sufficiently analyzed at trial, the court seemed to apply a sort of "good faith" standard, even though there was no testimony, live or otherwise, of any of the witnesses involved. Even if the "state of mind"[27] of a corporation was somehow relevant, this would clearly pre-

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[26] *Id.* at 356, quoting Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 Chicago—Kent L. Rev. 1, at page 4, 14-15 (1982).

[27] App. A at 10a.

clude the entering of a summary judgment.[28] "It is only when the witnesses are subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice." *Hughes* v. *American Jawa, Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976).

Undercapitalization is a factor that weighs heavily in favor of finding that the corporate form should be disregarded and the person in control of the corporation held responsible for acts undertaken in its name. *Eagle Transport, Ltd., Inc.* v. *O'Connor*, 470 F. Supp. 731, 733 (S.D. N.Y. 1979). The issues of undercapitalization and control are material and, where there is conflicting evidence as to whether an entity is undercapitalized, summary judgment is not appropriate. *Snyder* v. *United States*, 717 F.2d 1193 (8th Cir. 1983); *Sabine Towing & Transportation Co., Inc.* v. *Merit Ventures, Inc.*, 575 F. Supp. 1442 (E.D. Tex. 1983).

In the *Sabine* case, it was also noted that where a parent reaps a benefit by structuring the subsidiaries in a particular manner, including gaining tax benefits, as Telecom did in this case, there is an additional burden to adequately capitalize the business. *Id.* at 1446. If that burden is not met, the corporation should be held primarily liable for the subsidiary's debts in order to avoid injustice to innocent third parties.

There does not appear to be any authority which would support the court of appeals' holding that the purchase of insurance, of any type or in any amount, eliminates a parent corporation's obligation to adequate capitalize its subsidiary.[29] Under the cases cited above, the most that

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[28] It has been held that summary judgment should be used sparingly when the case sounds in tort, particularly where motive and intent are at issue. See, e.g., *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

[29] Exhaustive research has revealed only one other reported case where the defendant tried to avoid the obligations of its undercapitalized subsidiary by stating that it had procured a liability

can be said is that the issue of insurance might be one factor to take into consideration when analyzing the many factors which determine adequate capitalization. At best, the existence of insurance creates a genuine issue of material fact [30] which, even if taken in a light favorable to *respondent*, would preclude summary judgment. Incorrectly, the court of appeals held:

> We are convinced that this record raises no such issue. Insurance is unquestionably relevant on the issue of "undercapitalization". The existence of insurance goes directly to the question of the subsidiary's financial responsibility . . . we see nothing sinister in the fact that the insurance was purchased through an agency wholly owned by Telecom.

Appendix A at page 12.

This holding demonstrates a complete miscomprehension, both of the standards appropriate for a motion to dismiss and the standards appropriate for a motion for summary judgment. Insurance was noted by the court of appeals to be *relevant* on the *question* of undercapitali-

insurance policy on behalf of the subsidiary. In *Auglaize Boxboard Co.* v. *Henton*, 126 N.E. 881, 883 (Ohio 1919), the fact that the parent corporation purchased liability insurance for its subsidiary did not enable the parent to escape liability where there was clear evidence of corporate control of the subsidiary. This case was also discussed in the Douglas and Shanks article, *infra*, at 201.

[30] The court of appeals' naive statement that insurance is somehow superior to a positive cash balance (App. A at 9a) ignores the diversity of insurance coverage both as to quantity and quality. There is a growing amount of litigation addressing the issue as to whether insurance agents and brokers can be held to professional standards of conduct and, if so, what level of duty is owed to an insured to obtain coverage that is reasonable and prudent under the circumstances. In cases where agents have been held liable to an insured for insurer insolvency, the placing of insurance is analyzed thoroughly, including an agent's duty to analyze the solvency of any reinsurers. See e.g., *Williams -Berryman, Ins. Co., Inc.* v. *Morphis*, 461 S.W.2d 577, 580 (Ark. 1971). In short, not all insurance is created equal. The complex analysis which is attendant to this type of litigation should not be ignored by the trier of fact when assessing the strength of a corporation's capital structure.

zation. The word "relevant" indicates that insurance is not absolutely conclusive, and therefore, there is a genuine issue of material fact which precludes summary judgment. The second prong of the *Collet* test does not require improper motivation. Even if it did, the court of appeals' lengthy discussion over inadequate premiums clearly shows why these factual issues need to be reserved for the trier of fact. App. A at 9a-13a. Here, the court of appeals gave a selective reading to the facts, without giving the petitioner the benefit of any doubt, dismissing the case with prejudice by reducing petitioner's probative evidence to mere "errors in business judgment". App. A at 13a.

Liability insurance, and the adequacy thereof, is clearly a factor to be explored by the finder of fact at trial. It is not appropriate for the district court or the court of appeals to disregard Missouri law on the effect of undercapitalization and to adopt the respondent's line of defense on the insurance issue, particularly when questions abound as to the adequacy of such insurance.

## II. THE COURT OF APPEALS PLAINLY IGNORED CONTROLLING STATE LAW, CAUSING A DANGEROUS DEPARTURE FROM NATIONALLY ACCEPTED LEGAL PRINCIPLES AND WEAKENING THE PUBLIC'S PROTECTION FROM INSOLVENT CORPORATIONS.

The court of appeals' holding clearly contradicts Missouri substantive law. Missouri courts will disregard the existence of a corporate entity which is operated while undercapitalized. *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273, 286-287 (Mo. App. 1986). When the lack of appropriate capital causes an unjust loss, such as the inability to satisfy a creditor or a judgment plaintiff, the causation prong of the test is satisfied. *Id.*; *Grote Meat Co.* v. *Goldenberg*, 735 S.W.2d 379, 387 (Mo. App. 1987); *Accord H.H. Robertson Co.* v. *DiCarlo General Contractors, Inc.*, 789 F. Supp. 998, 1006 (E.D. Mo. 1992). This test is an objective one and does not hinge on a finding of improper intent.

Federal cases construing Missouri law have continued to follow the *Collet* test and have allowed the corporate veil to be pierced when one corporation exercises dominion and control over another and an injustice has been the result. In *H. H. Robertson Co.* v. *V. S. DiCarlo General Contractors, Inc., supra,* where the defendant was undercapitalized and unable to meet its financial obligations, the court held that plaintiff therefore met the second and third requirements for piercing the corporate veil. *Id.* Further, the requisite injustice was found where the record indicated that the plaintiff had no adequate legal remedy available to it as a result of the undercapitalization. Similarly, *Omaha Indemnity Co.* v. *Royal American Managers, Inc.*, 755 F. Supp. 1451 (W.D. Mo. 1991), held corporate officers and shareholders personally liable for the tortious conduct of their corporation, under the alter ego or instrumentality theory, where the corporation was undercapitalized. In fact, the *Omaha Indemnity* court found that the undercapitalization itself "is a misuse of the corporate form that will justify disregarding the legal fiction of a separate corporate existence". *Id.* at 1458, citing *Collet* at 286-87.[31]

Consequently, the Eighth Circuit's decision in this case presents an affront to the concept of federalism. Under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal courts must follow state substantive law in tort cases. The controlling Missouri case law holds that undercapitalization which results in unjust loss is sufficient to pierce the corporate veil when the parent dominates its subsidiary.[32] The court of appeals' express refusal to follow state law should, alone, provide grounds for review by this Court. See, e.g., *Six Companies* v. *Highway Dis-*

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[31] See also *Grote Meat Co., supra,* 735 S.W.2d at 387.

[32] *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986); *Grote Meat Co.* v. *Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987); *May Dept. Stores* v. *Union Electric Light & Power Co.*, 107 S.W. 2d 41 (1937). See also *Swall* v. *Custom Automotive Services, Inc.*, 831 S.W.2d 237, 240 (Mo. App. 1992).

*trict*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

Unlike the courts of Missouri, the court of appeals discounts the importance of undercapitalization and gives this concept weight only insofar as it might indicate *another* improper purpose or fraudulent act. Appendix A at 6a-7a. The second element of *Collet*, however, is written in the disjunctive and it is satisfied if "the control of the subsidiary is used to commit fraud *or* wrong, to perpetrate the violation of a statutory *or* other positive legal duty, *or* dishonest and unjust act in contravention of plaintiff's legal rights". *Collet* at 284. Missouri courts have made it clear that undercapitalization is more than sufficient to show the violation of a corporation's positive legal duty to adequately finance its offspring. Although the court of appeals acknowledged that this approach was uniformly followed by the Missouri courts, it expressly chose to disregard undercapitalization as a proper basis for meeting the second element of *Collet*:

> The reason, we think, is not because undercapitalization, in and of itself, is unlawful (though it may be for some purposes) but rather because the creation of an undercapitalized subsidiary justifies an inference that the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it.

App. A at 6a. Missouri law, however, is consistent with the overwhelming weight of authority which holds that undercapitalization is in and of itself a form of inequitable conduct. The *Collet* court, in discussing the second prong of the test, stated that:

> The control exercised by that corporation must have been used in an improper manner . . . Examples of such wrongs as would satisfy this standard include actual torts, violations of statutory duties, *undercapitalization*, *or* the stripping of assets from the subservient corporation.

*Id.* at 286 (emphasis supplied, citations omitted). It is not necessary to show that the dominant corporation or

shareholder intended any harm. It is only necessary to show that harm or injustice resulted from the insolvency. The standard requires an objective rather than a subjective test.[33]

The "improper motive" issue should be put to rest by the Supreme Court's holding in the case of *Anderson* v. *Abbott*, 321 U.S. 349 (1944). In that case, the shareholders of a bank stock holding company were held liable for assessments on an insolvent bank even though the holding company they created was organized in good faith, without fraudulent intent and the shareholders had no specific intention of avoiding liability.

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied . . . the cases of fraud make up part of that exception (citations omitted) But they do not exhaust it. An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. (citations omitted) That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat.

*Id.* at 362.

There are many benefits which accompany the creation of the corporate structure, including limited liability. However, when a parent corporation dominates the actions and policies of its subsidiary, it must bear the burden of adequately financing that subsidiary. Speculation as to the *why* Contrux's incorporators kept it insolvent is fruitless. A subsidiary is either undercapitalized or it is not. If it *is*, and the subsidiary is a mere conduit of the parent, the veil will be pierced.

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[33] *In re: Mobile Steel Co.*, 563 F.2d 692, 703 (5th Cir. 1977); *Eastridge Development Co.* v. *Halpert Assoc., Inc.*, 853 F.2d 772, 779-780 (10th Cir. 1988); *In re: Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991).

The facts presented by petitioner, even at this undeveloped pleading stage, clearly support a showing of undercapitalization and the court of appeals admitted as much:

> Most of the money contributed to its operation by Telecom was in the form of loans, not equity, and when Contrux first went into business, Telecom did not pay for all of the stock that was issued to it. This is a classic instance of watered stock, of putting a corporation into business without sufficient equity investment. Telecom in effect concedes that Contrux's balance sheet was anemic, and that, from the point of view of generally accepted accounting principles, Contrux was inadequately capitalized.

App. A at page 7a.

At least one author has advocated the use of undercapitalization as an independent basis for liability, i.e. if the subsidiary is undercapitalized, the loss should fall on the parent, not an innocent third party.

> The argument for inadequate capitalization as an independent factor for shareholder liability is strongest when viewed with respect to the tort claimant. He stands as an innocent party, injured by the insolvent corporation with whom he has come in contact, unable to recover a claim involuntarily incurred. Unlike the contract creditor, he neither consented to nor assumed the risk of insolvency or inadequacy of capital. Yet the corporation is permitted to avoid *any and all* costs of such incident where the amount exceeds the corporate capital. The inherent unfairness . . . is readily apparent.[34]

Although the power to pierce the corporate veil is to be exercised cautiously, the entity should be disregarded if there is undercapitalization and limiting the corporation's liability would create injustice or fundamental unfairness. *DeWitt Truck Brokers* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976). Following the

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[34] Salomon, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temple L.Q. 321 (1974).

principles set forth in *Anderson* v. *Abbott*, *supra*, the *DeWitt* court noted that a finding of fraud is *not a prerequisite* to piercing the corporate veil, especially when there is undercapitalization or domination of the corporate entity under scrutiny.[35]

In the case of *Bucyrus-Erie Co.* v. *General Products Corp.*, 643 F.2d 413 (6th Cir. 1981) the court utilized the same test as *Collet* in piercing the corporate veil. It flatly rejected the suggestion that fraudulent intent is required in order to find "alter ego" liability. *Id.* at 418. The court did find, however, that "[u]ndercapitalization is generally regarded an important factor in applying the alter ego doctrine, and sound policy considerations support a requirement for adequate financing as a prerequisite to the limited liability privilege afforded those who do business in a corporate form." *Id.* Thus, there appears to be a conflict in the circuits as to how the very same test is to be interpreted. The Sixth Circuit approach matches that of the Missouri courts and clearly is the correct one, holding that undercapitalization in an objective sense is sufficient to satisfy the second prong of the test and that fraudulent intent or improper purpose has no place in this analysis.[36]

The court of appeals' ruling weakens the laws protection of the public against insolvent tortfeasors. Undercapitalization is a ground for piercing the corporate veil because it is "the policy of the law that shareholders

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[35] *Id.* at 684; See also, *Kirvo Industrial Supply Co.* v. *National Distillery & Chemical Corp.*, 483 F.2d 1098, 1106-7 (5th Cir. 1973); *National Marine Service, Inc.* v. *C. J. Thibodeaux & Co.*, 501 F.2d 940, 942 (5th Cir. 1974). *Accord Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974). (Corporate form may be disregarded in the interest of justice where it is used to defeat an overriding public policy. Certainly public policy embraces the notion that parent corporations cannot escape liability without adequately financing their subsidiaries.)

[36] See also *Northern Illinois Gas Co.* v. *Total Energy Leasing Corp.*, 502 F. Supp. 412 (E.D. Ill. 1980); *United States* v. *Healthwin-Midtown Convalescent Hospital & Rehabilitation Center, Inc.*, 511 F. Supp. 416 (C.D. Cal. 1981).

should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities."[37] The corporate veil is often pierced in cases where the insolvency of the subsidiary results in a manifest injustice, including the insufficient recovery to an unsuspecting tort plaintiff.[38]

It has often been held that the separate identity of two corporations should be disregarded where one becomes the conduit of another. See e.g., *Talen's Landing, Inc.* v. *M/V Venture, II*, 656 F.2d 1157 (5th Cir. 1981). Here, Telecom wanted to continue its business of providing truck transportation throughout several states, including Missouri, and did not want to be encumbered by the union problems that Red Ball Spector was experiencing. Evidence of tax benefits also was presented. While it may have been legal for Telecom to set up a new subsidiary to circumvent these labor matters, it is clear that Contrux was a conduit or instrumentality set up so that this line of business could be continued:

> In every respect on the basis of the record now before us, Contrux was nothing but a shell corporation established by Telecom to permit it to operate as a non-union carrier without regard to the consequences that might occur to those who did business with Contrux or those who might be affected by its actions.[39]

The benefits of incorporation must be accompanied by the parent's willingness to adequately capitalize the new entity. Under Missouri law, undercapitalization is sufficient to support the second element of *Collet*.[40] It does not require a subjective finding of evil motive. The

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[37] *Ballentine on Corporations*, 302-303 (1946 Ed.).

[38] *West* v. *Costen*, 558 F. Supp. 564, 587 (W.D. Va. 1983); *H.H. Robertson Co.* v. *DiCarlo General Contractors, Inc.*, 789 F. Supp. 998, 1000 (E.D. Mo. 1992); *Kramer* v. *Keyes*, 643 F.2d 382, 385 (5th Cir. 1981); *George W. Bennett Bryson & Co., Ltd.* v. *Norton Lilly & Co., Inc.*, 498 F.2d 328, 329 (5th Cir. 1974).

[39] Senior Circuit Judge Heaney, dissenting. App. A at 16a.

[40] Sinclair, *Systematizing Piercing the Corporate Veil*, Oct./Nov. 1988 Mo. Bar J. 423 (1988); *Swall, supra*, 831 S.W.2d at 240.

Eighth Circuit thus violated the *Erie* doctrine [41] and the public policy designed to protect victims of insolvent corporations. Arguably, this protection becomes even more important in these economically undisciplined times, where businesses, individuals, and governments seem reluctant to accept the financial consequences of their actions.

## CONCLUSION

The Eighth Circuit Court of Appeals' decision to affirm the dismissal of this case is based solely on its rejection of the district court's firm holding that Contrux was indeed undercapitalized and that such undercapitalization was sufficient to meet the second element of the *Collet* test. The decision reflects (1) confusion regarding the level of proof necessary at this stage of the proceedings; and (2) refusal to apply Missouri law regarding the undercapitalization of a subsidiary corporation which is clearly dominated by its parent.

The three *Collet* elements [42]—commonly known as control, improper purpose, and proximate cause—are clearly satisfied in this case. All of the courts below have held that the first element, control, was established. The "improper purpose" prong is not limited to intentional or reckless acts and, in fact, the Missouri courts have clearly held that where a corporation is undercapitalized, the second prong of *Collet* is fully satisfied. See *Collet* at 287.

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[41] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[42] It should also be noted that the most recent case on this issue applies a two pronged test. In *Swall* v. *Custom Automotive Services, Inc.*, 831 S.W.2d 237, 240 (Mo. App. 1992), the court held that the president and vice-president of a corporation were personally liable for a corporate debt where (1) they dominated and controlled the corporation and (2) the corporation was undercapitalized. It could be argued that the three prong test and the two prong test are basically indistinguishable. Both require domination by the shareholder and the use of such control to perpetrate an injustice. See *Swall supra* and *Terre du Lac Association, Inc.* v. *Terre du Lac, Inc.*, 737 S.W.2d 206, 218 (Mo. App. 1987). The third prong of the *Collet* test is essentially one of causation. Obviously, a plaintiff would not have standing if the control and undercapitalization did not result in some kind of loss, liquidated or otherwise.

Under Missouri law, the inability to repay a debt or satisfy a judgment is the type of injury that can satisfy the third prong. There can be no question that petitioner fulfilled his prima facie obligation. The subjective intent element employed by the Court of Appeals for the Eighth Circuit is not supported in any way by Missouri law and, in fact, negates the holdings of *Collet* and its progeny. Further, it creates a direct conflict between circuits, especially the Sixth,[43] Seventh,[44] Fifth,[45] Ninth [46] and Tenth[47] Circuits which utilize essentially the same test in deciding whether or not to pierce the corporate veil. See also *Anderson* v. *Abbott*, *supra*.

Although there is disagreement within the Court, and certainly some confusion within the circuits, as to the effect of *Anderson* v. *Liberty Lobby*, when competent evidence is proffered by the plaintiff which is in conflict with the defendant's pleadings, the lower courts should resolve all factual disputes in favor of the plaintiff and allow issues of material fact to be fully developed at trial. This is the only way that a legitimate claimant's right to trial by jury can be enforced. The administrative and social benefits which flow from the summary judgment concept are admittedly important in federal and state litigation. However, the burden on the plaintiff should not be so high that a district court or court of appeals is free to disregard plaintiff's competent (and uncontroverted) evidence and resolve genuine issues of material fact at the pretrial stage. If *Anderson* is to remain viable, it cannot be extended to "transformed" cases. Here, the respondent controlled its subsidiary. That control resulted in misuse

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[43] *Bucyrus-Erie Co.* v. *General Products Corp.*, 643 F.2d 413 (6th Cir. 1981).

[44] *Steven* v. *Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963).

[45] *Talen's Landing, Inc.* v. *M/V Venture II*, 656 F.2d 1157 (5th Cir. 1981).

[46] *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977).

[47] *Eastridge Development Co.* v. *Halpert Assoc., Inc.*, 853 F.2d 772 (10th Cir. 1988).

of the corporate structure as shown by its undercapitalization. The petitioner is permanently brain damaged and may be without any remedy because of the insolvency of the subsidiary. Therefore, a clear injustice will result if the corporate structure is given undue credence.

Here the court of appeals chose to disbelieve petitioner's probative evidence in favor of respondent's lines of defense. This violates the rulings of this Court even if a motion for summary judgment were properly presented to the court and adequate notice given to the plaintiff. By rejecting substantive Missouri law on the legal effect of undercapitalization, the *Erie* doctrine was violated. Not only was petitioner subjected to an unforeseeable level of scrutiny; he was confronted with an unforeseeable departure from settled Missouri law.

This Court's supervisory powers should be employed to provide guidance to the circuits as what constitutes a prima facie case when in personam jurisdiction is challenged. Also, because the Federal Rules of Civil Procedure do not contemplate the transforming of a 12(b)(2) motion into a Rule 56 motion, the courts need to understand if and when that transformation is proper and, more important, how a plaintiff's constitutional rights can be safeguarded when his burden changes from being "minimal or slight" to proving by a preponderance of the evidence that a reasonable jury could find in his favor.[48]

Respectfully submitted,

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[48] *Anderson, supra*, 477 U.S. at 257.